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State v. Gallegos Appellant's Brief Dckt. 43545

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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|-----------------------|---|----------------------------|
| STATE OF IDAHO, |) | |
| |) | NO. 43545 |
| Plaintiff-Respondent, |) | |
| |) | ADA COUNTY NO. CR 2015-308 |
| v. |) | |
| |) | |
| ANDY DEMOSTENES |) | |
| GALLEGOS, |) | APPELLANT'S BRIEF |
| |) | |
| Defendant-Appellant. |) | |
| _____ |) | |

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Andy Demostenes Gallegos pleaded guilty to two counts of attempted rape. The district court imposed consecutive sentences of fifteen years, with twelve years fixed, and fifteen years, with eight years fixed. Mr. Gallegos then filed an Idaho Criminal Rule 35 Motion for reconsideration of the sentences. Subsequently, the district court denied the motion. On appeal, Mr. Gallegos asserts that the district court abused its discretion when it imposed the sentences, and when it denied his motion for reconsideration of his sentences.

Statement of the Facts & Course of Proceedings

In August of 2010, P.B. reported to the police that an unknown male had attempted to rape her in her home. (Presentence Report (*hereinafter*, PSI), p.3.)¹ P.B. said she was at a bar in Boise and returned home with a male friend but went to sleep alone. (PSI, p.3.) She said she was awoken several hours later by a man in her bed who told her to get on her stomach. (PSI, p.3.) The man then put a blanket over P.B.'s head, punched her several times in the face, and said, "It will hurt more if you fight it." (PSI, p.3.) He then said, "Come, let me put it in your mouth." (PSI, p.3.) When the man tried to remove P.B.'s underwear, she resisted, and the man then fled from the home. (PSI, p.3.) P.B. then went to the nearby Jackson's market. (PSI, p.3.) When officers later met her there, she was crying and bleeding profusely from her mouth and nose. (PSI, p.3.) During the investigation, officers discovered a Boise State baseball cap in P.B.'s bedroom. (PSI, p.3.) The cap was submitted for forensic analysis, and an unknown DNA profile was identified. (PSI, p.3.)

In September of 2010, C.C. reported to the police that she was raped by a man in her home. (PSI, p.3.) C.C. said she went to sleep in her bedroom and was later awoken by a man she thought was her boyfriend. (PSI, p.3.) During sex, she realized the man was not her boyfriend and tried to turn the light on, but the man grabbed her by the arm and would not let her reach the light. (PSI, p.3.) C.C. agreed to a forensic sexual assault examination, and a DNA profile of the suspect was identified. (PSI, p.3-

¹ All citations to the PSI and its attachments refer to the 1567-page electronic document. The "Official Version" of the crimes starts on page 3 of the PSI and references an "Incident 1." Count One of the indictment originally charged Mr. Gallegos with rape for this incident. (R., pp.5-6.) However, the alleged victim in that case (S.M.)

4.) In December of 2010, Boise Police were notified that the DNA profile taken from C.C.'s examination matched the profile from the hat found in P.B.'s bedroom. (PSI, p.4.)

In October of 2014, an artist's sketch of a suspect known as the "BSU Prowler" was released by the media. (PSI, p.5.) An anonymous caller later identified Mr. Gallegos from the sketch. (PSI, p.4.) Therefore, detectives went to Mr. Gallegos's residence to obtain a sample of his DNA, and Mr. Gallegos agreed. (PSI, p.5.) In January of 2015, an Idaho State Police Forensic Lab Scientist confirmed that Mr. Gallegos's DNA matched the DNA found in the investigations of the crimes against P.B. and C.C. (PSI, p.5.)

Mr. Gallegos was arrested, and police executed a search warrant on his home where they found multiple pairs of women's underwear including, one pair that was confirmed by the owner as being stolen during a burglary near BSU. (PSI, p.6.) Three prior victims of the "BSU Prowler" also identified Mr. Gallegos from photo lineups. (PSI, p.6.)

Mr. Gallegos was originally charged, by indictment, with two counts of rape, one count of attempted rape, and two counts of burglary. (R., pp.25-26.) Pursuant to a plea agreement, Mr. Gallegos pleaded guilty to one count of rape and entered an *Alford*² plea to one count of attempted rape. (Tr. 6/24/15, p.26, Ls.11-15.) In exchange, the State dismissed the additional charges. (Tr. 6/24/15, p.5, Ls.14-16.) Prior to the sentencing hearing, however, the State discovered that the rape had been charged

later admitted that the sex was consensual, so the charge was dismissed. (R., p.50; PSI, p.6; Tr. 7/14/15, p.5, Ls.17-19.)

² *North Carolina v. Alford*, 400 U.S. 25 (1970).

under a revised version of I.C. § 18-6101, which was not in effect in 2010 when the crimes were committed. (Tr. 7/14/15, p.5, L.11 – p.6, L.3.) As a result, the State filed an “amended information,” wherein Count III was changed from rape to attempted rape. (Tr. 7/14/15, p.6, Ls.4-6; R., pp.96-97.) Mr. Gallegos agreed to waive a preliminary hearing on that charge, and the district court bound the case over to itself and held a new change of plea hearing at which Mr. Gallegos pleaded guilty to two counts of attempted rape. (Tr. 7/14/15, p.15, Ls.15-24. Tr. 7/14/15, generally.)

At the sentencing hearing, the State recommended that the district court impose a sentence of fifteen years, with ten years fixed for Count II, and a consecutive sentence of fifteen years, with zero years fixed, for Count III. (Tr. 8/11/15, p.50, Ls.7-12.) Mr. Gallegos’s counsel requested that the district court impose two consecutive sentences of ten years, with three and one-half years fixed. (Tr. 8/11/15, p.59, Ls.5-9.) The district court imposed a sentence of fifteen years, with twelve years fixed, on Count II, and a consecutive sentence of fifteen years, with eight years fixed. (Tr. 8/11/15, p.68, L.19 – p.69, L.2.) Subsequently, Mr. Gallegos filed an Idaho Criminal Rule 35 motion for reconsideration of sentence and a brief supporting that motion, but the district court denied the motion. (See Motion for Reconsideration of Sentence; Brief in Support of Defendant’s Motion for Reconsideration of Sentence; Order on Defendant’s Rule 35 Motion to Reconsider Sentence (augmented to the record contemporaneously).)

ISSUES

1. Did the district court abuse its discretion when it imposed consecutive sentences of fifteen years, with twelve years fixed, and fifteen years, with eight years fixed, following Mr. Gallegos's pleas of guilty to two counts of attempted rape?
2. Did the district court abuse its discretion when it denied Mr. Gallegos's Idaho Criminal Rule 35 Motion for Reconsideration of Sentence in light of the plethora of positive letters the court received, which supported reducing Mr. Gallegos sentences?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed Consecutive Sentences Of 15 Years, With 12 Years Fixed, And 15 Years, With 8 Years Fixed, Following Mr. Gallegos's Pleas Of Guilty To Two Counts Of Attempted Rape

Based on the facts of this case, Mr. Gallegos's consecutive sentences of fifteen years, with twelve years fixed, and fifteen years, with eight years fixed, are excessive because they are not necessary to achieve the goals of sentencing. When there is a claim that the sentencing court imposed an excessive sentence, the appellate court will conduct an independent examination of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. See *State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

Independent appellate sentencing examinations are based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276 (Ct. App. 2000). When a sentence is unreasonable based on the facts of the case, it is an abuse of discretion. *State v. Nice*, 103 Idaho 89, 90 (1982). Unless it appears that confinement was necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given

case,” a sentence is unreasonable. *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). Accordingly, if the sentence is excessive, “under any reasonable view of the facts,” because it is not necessary to achieve these goals, it is unreasonable and therefore an abuse of discretion. *Id.*

There are several mitigating factors that illustrate why Mr. Gallegos’s sentence is excessive under any reasonable view of the facts. First, Mr. Gallegos had an extremely abusive childhood. Mr. Gallegos said he was scared of his father’s violent behavior for much of his childhood and felt “relieved” when his father went to prison for a drug conviction. (PSI, p.15.) He said that his father was “really, really violent” when he was using drugs. (PSI, p.14.) In fact, he remembered many times when his mother took him, along with his brother and sisters, to friends’ houses or motels so that they could actually hide from his father. (PSI, p.14.) He explained that his mother would often “jump in the way” when his father was abusing him and said, “I don’t recall the first time I was beat but my mother said he gave me a bloody nose at two.” (PSI, p.15.)

Additionally, Mr. Gallegos explained that he was sexually abused for years by a male neighbor who was three years older than him. (PSI, p.15.) He said that the boy made him perform oral sex and anally penetrated him. (PSI, p.15.) This abuse went on for five years when Mr. Gallegos was between the ages of six and eleven. (PSI, p.15.) Notably, he said he had never divulged that this abuse occurred, but said he now wanted to get over his past. (PSI, p.16.) An abusive childhood is a long-recognized mitigating factor. *State v. Gonzales*, 123 Idaho 92, 93-94 (Ct. App. 1993)

Mr. Gallegos has also struggled for many years with substance abuse. He said he first tried alcohol when he was fourteen years old but started drinking heavily when

he was about 17 or 18. (PSI, pp.23, 187.) He said when his older brother passed away in 2010, he was “drinking every day for about a year and a half” and “blacked out a lot.” (PSI, p.23.) He also had a significant problem with marijuana. He said he started smoking once or twice a day when he was 16 or 17, and, by the time he was 26, he was consuming up to a gram of marijuana every day. (PSI, p.23.) Mr. Gallegos admitted that he had a drug and alcohol problem for which he wants treatment. (PSI, p.23.) He also admitted that he is a sex addict and that his desire for sex becomes stronger when he is drinking. (PSI, p.22.) When asked about his offenses, he said, “When I committed these crimes, I wasn’t in my normal state of mind. My brother passed away July 24th 2010 [and] I went out of control drinking [and] being depressed for some time. It’s not an excuse for what happened but I feel things would have gone different if I was my normal self.” (PSI, p.24.) He went on to say, “Today I plan to take the proper treatment programs so I can have a good future & never hurt anyone or my family again.” (PSI, p.24.) A defendant’s substance abuse should also be considered as a mitigating factor. *State v. Nice*, 103 Idaho 89, 91 (1982)

Mr. Gallegos also showed remorse over his actions and accepted responsibility for the crimes. He said, “I feel horrible. I hurt innocent people.” (PSI, p.24.) And, in his statements to the district court, he said, “I’m sorry I was ever in a situation to hurt those women.” (PSI, p.24.) He also said that he was “not alright with the fact that I hurt anyone. . . .” (PSI, p.24.) These convictions were also Mr. Gallegos’s first felony convictions. (PSI, pp.9-12.) Idaho courts consider this fact, as well as the fact that a defendant expresses remorse and accepts responsibility as mitigating information. *State v. Nice*, 103 Idaho 89, 91 (1982); *State v. Shideler*, 103 Idaho 593, 594-95 (1982).

Additionally, despite these offenses, Mr. Gallegos still enjoys the support of his family and friends. This should also be considered as mitigating information. *Shideler*, 103 Idaho at 595. The letters submitted to the district court paint a picture of a generous man who was always willing to help his friends and family. (PSI, pp.113-20.) For example, one person said that Mr. Gallegos helped his family pack and move over the course of a month. (PSI, p.115.) He said, “[w]ithout his help we would have never made it.” (PSI, p.115.) Mr. Gallegos’s older brother, Rob Hernandez, wrote that because he was much older than Mr. Gallegos, he never got to spend much time with him when they were young, but said, “I have gotten to know and love Andy through work more than anything else.” (PSI, p.117.) He said that Mr. Gallegos went to work for his landscaping company at a young age and “gave most of his money to our mother to help her.” (PSI, p.117.) Mr. Hernandez also said that, during the recession, Mr. Gallegos was the company’s only employee, “worked for little more than minimum wage,” and started doing the work of 2 or more.” (PSI, p.117.) He said that during that period, Mr. Gallegos “worked hard at a fast pace day after day without complaining” for several years. (PSI, p.117.) Mr. Hernandez wrote that Mr. Gallegos “did it to help us keep our business from failing and so we could support our own families.” (PSI, p.117.)

Mr. Gallegos’s sister wrote that Mr. Gallegos had “a very kind heart.” (PSI, p.118.) She said that when he was just six years old, he “gave away his biggest Christmas gifts to another boy who didn’t have any.” (PSI, p.118.) She also said that Mr. Gallegos truly loved animals and recalled a story where he had rescued a “crippled baby duck” from a job site, brought the duck home and built a pool for it to live in. (PSI, p.117.)

Mr. Gallegos's mother also said that Mr. Gallegos was "a huge animal lover and protector." (PSI, pp.1425, 1427.) She also wrote that Mr. Gallegos was a generous person. For example, she said that she once bought two brand new pairs of shoes for Mr. Gallegos when he was 16 years old, and he offered to let his friend, who she said "had even less than Andy did" take a pair of shoes of his choosing. (PSI, pp.1425-26.)

Given the wealth of mitigating information here, Mr. Gallegos's sentence was excessive because it was not necessary to achieve the goals of sentencing outlined in *Toohill*. Indeed, the State recommended only half the fixed time that the district court ultimately imposed. (Tr. 8/11/15, p.50, Ls.7-12.) As such, the State obviously believed that society would be protected if Mr. Gallegos was incarcerated for ten years and then had the opportunity to prove himself on parole. This would have certainly served as a strong deterrent and would still ensure that there was significant retribution for the crimes. But most importantly, it would give Mr. Gallegos a chance at meaningful rehabilitation sooner. There is no question Mr. Gallegos committed serious crimes, but he deserves an opportunity to show that he can overcome his past and consistently be the kind of person that he clearly was to his friends and family. The district court failed to adequately consider the wealth of mitigating information in this case. As such, it abused its discretion when it doubled the fixed time that the State recommended.

II.

The District Court Abused Its Discretion When It Denied Mr. Gallegos's Rule 35 Motion For Reconsideration Of Sentence In Light Of The Plethora Of Positive Letters The Court Received, Which Supported Reducing Mr. Gallegos's Sentences

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which

may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). “The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable.” *Id.* “If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.*

Mr. Gallegos presented new information in the form of multiple letters of support from friends and family.³ (Attached to Brief in Support of Defendant’s Motion for Reconsideration of Sentence (*hereinafter*, Attachments)⁴ (augmented to the record contemporaneously). There are too many letters to reference all of them, but, like the letters sent to the district court prior to sentencing, these letters also make it obvious that Mr. Gallegos’s family and friends knew him to be a very different person than the person who committed these offenses. In a letter from Mr. Gallegos’s mother, she asked the district court to reconsider its sentence and said, “I know what goodness and strength is in Andy, and I believe 100% that he can make big changes in his life if he has the proper sex offender education and programming.” (Attachments, p.1.) Ms. Hernandez went on to say that “Andy is strong enough and determined enough to learn from and make use of the sex offender programs in prison. . . Andy needs someone to help him understand himself and to help him make sense of his childhood.” (Attachments, p.1.)

³ Some of the letters attached to the brief were previously submitted for the district court’s consideration at sentencing. As such, they are not referenced here. However, many of the letters were new and specifically asked the district court to reconsider its sentence.

Ms. Hernandez also chose to include a passage from a book she was writing “to help [her] make sense of all that has happened and to also share Andy’s story.” (Attachments, p.1.) The passage depicted one experience from Mr. Gallegos’s childhood that Ms. Hernandez felt contributed to Mr. Gallegos’s PTSD.⁵ (Attachments, p.2.) In it, she described how — when Mr. Gallegos was a child — he ran to a neighbor’s house to try to save his mother from the abuse she was enduring at the hands of Mr. Gallegos’s father. (Attachments, p.2.) She said that Mr. Gallegos ran to a neighbor’s house and pleaded with him to call the police because he was terrified that his father would kill his mother. (Attachments, p.2.) She wrote, “Andy believed with all his heart and soul that uttering those words would get him killed by his father . . . but his love was so strong for his mother that he was willing to give up his own life.” (Attachments, p.2.) She went on to describe how Mr. Gallegos had to be hidden from his father after that and said, “I seriously failed Andy because I was unaware of what PTSD was and what effects it could have on a child if left untreated.” (Attachments, p.2.)

Dean Donlon, the boyfriend of Mr. Gallegos’s sister, also wrote a letter in support of a sentence reduction. He said, “Andy has always been the kind of person who would give anyone the shirt off his back or the shoes off his feet and go without himself if it helped someone else have a better day.” (Attachments, p.9.) Mr. Donlon also said that

⁴ For ease of reference, undersigned counsel will refer to the attachments by page number. The attachments were not originally paginated, but there are 31 pages in total.

⁵ The Psychosexual Evaluator ruled out PTSD but said, “[c]ontinued monitoring would be advised, and if additional information presented, reconsideration of diagnosis may be in order.” (PSI, p.61.)

Mr. Gallegos “has always been there to take care of his mom and would do anything for friends and family even it meant giving up something himself.” (Attachments, p.9.)

Mr. Gallegos’s sister also wrote to ask the district court to reconsider its sentence and follow the prosecutor’s recommendation. (Attachment, p.10.) She said that when her father (not Mr. Gallegos’s father) had cancer, Mr. Gallegos “helped care for him as it was very difficult for my dad to get around. Andy was there to help – even in the middle of the night and especially at the end when my dad was unable to get himself out of bed or really do anything without complete assistance.” (Attachment, p.10.) She said, “Andy was never asked to care for my father. He did it out of the goodness of his heart. Andy does things for people never expecting anything in return but only to help.” (Attachment, p.10.) She also said that, after September 11th, Mr. Gallegos “and one of his friends set up outside the fire station down the street from my grandmother’s house and raised \$300 they gave the fire station to donate to help.” (Attachment, p.10.)

Another friend of the family, Jerry Anderson, wrote a letter in which he acknowledged that Mr. Gallegos had committed “some serious offenses” but pointed out that Mr. Gallegos was committed to his education and would benefit from the classes that would eventually be available to him in prison. (Attachment, p.31.) He commented, however, that he could not “imagine such a long life in the prison system doing anything except for more harm. The 10 years that the prosecution asked for seems to be a more than strict enough sentence. It would give the victims justice and also give the treatment programs a chance to do some good.” (Attachment, p.31.) Mr. Anderson pointed out that every person who improves as a result of the programs in prison “is a

victory for all of us” and asked the district court to “[l]et Andy be one of the victories, not one of the failures.” (Attachment, p.31.)

The district court failed to adequately consider the mitigating information in the letters of support from Mr. Gallegos’s friends and family. As such, it abused its discretion when it denied his Rule 35 motion.

CONCLUSION

Mr. Gallegos respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing. Alternatively, he requests that the order denying his Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 23rd day of March, 2016.

_____/s/_____
REED P. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of March, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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STEVEN J HIPPLER
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E-MAILED BRIEF

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_____/s/_____
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RPA/eas